

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

3 DONNA KASSMAN, et al.,

4 Plaintiffs,

5 v.

11 Civ. 3743 (LGS)

6 KPMG LLP,

7 Telephone Conference

Defendant.

8 -----x  
9 New York, N.Y.  
10 February 21, 2018  
11 11:25 a.m.

12 Before:

13 HON. LORNA G. SCHOFIELD,

14 APPEARANCES (via telephone)

15 SANFORD HEISLER SHARP, LLP  
16 Attorneys for Plaintiffs

BY: KATIE MUETING  
17 THOMAS J. HENDERSON

SIDLEY AUSTIN LLP  
18 Attorneys for Defendant

BY: COLLEEN M. KENNEY  
19 -and-

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.  
20 BY: PETER O. HUGHES

1 (In the robing room)

2 THE COURT: Good morning. Thank you, Ms. Kenny, for  
3 responding to our e-mail late yesterday. I realize it's not as  
4 late where you are where we are. It's still appreciated.

5 This is a challenge because I don't have the  
6 background of what understandings you all had between you  
7 regarding discovery. My initial reaction, but for one of the  
8 statements in plaintiffs' letter, is that if documents are  
9 produced, they ordinarily aren't redacted for relevance unless  
10 there is some kind of confidential or sensitive information  
11 that's being redacted. This whole idea of redacting for  
12 relevance I don't get.

13 On the other hand, if it's been the practice of the  
14 parties since the beginning on both sides to redact for  
15 relevance, that is a different story. Can someone fill me in  
16 on that.

17 MS. KENNEY: Your Honor, speaking on behalf of KPMG,  
18 KPMG did do redactions. What was redacted from KPMG's  
19 material -- I know you don't recall every time we were before  
20 you, but information relating to the selection to the  
21 partnership was redacted, and we had a hearing on that that was  
22 redacted. There was material, very little actually, redacted  
23 from the performance reviews of supervisors and that was the  
24 result of a hearing with your Honor. The names of people on  
25 the IENM system-generated reports were redacted and that was a

1 result of a hearing with your Honor.

2 And the other information that KPMG redacted would be  
3 something -- for example, for nonrelevant, non putative class  
4 members. Let's say there was someone who was a  
5 paraprofessional and their name and their compensation  
6 information shows up in a spreadsheet. Their name and their  
7 compensation information was redacted, but their position that  
8 they were, such as a paralegal, that would have been left in  
9 there. It would only be that kind of confidential information  
10 that would need to be redacted other than material we came to  
11 the Court for.

12 THE COURT: On plaintiffs' side have there been  
13 redactions on relevant grounds? Let me hear from the  
14 plaintiffs. Ms. Mueting.

15 MS. MUETING: Thank you, your Honor. I think Ms.  
16 Kenney is right that there has been relevance redactions  
17 throughout the scope of this case. And I think what is a  
18 little bit different here is a redaction to a Word document or  
19 an e-mail or not producing an e-mail attachment, as KPMG has  
20 done, and components of the production is that this analysis  
21 that was ordered by the Court --

22 THE COURT: Keep your voice up. Our court reporter is  
23 not like right on top of the phone.

24 MS. MUETING: I was just saying that unlike an e-mail  
25 that may include redactions, this analysis that the Court

1 ordered here was located in a program file, which is more akin  
2 to a file cabinet or a notebook than it is to say a Word  
3 document or an e-mail string.

4 THE COURT: Let me just ask this question, and I'm  
5 sorry to interrupt. I saw that argument that you had made, but  
6 I guess what I don't understand is, this is your expert who  
7 analyzed the data for purposes of this case and his opinion,  
8 and there is no analysis of other companies for other lawsuits  
9 in this program and coding, I presume. We are only talking  
10 about his analysis for purposes of this case. I don't  
11 understand what makes something relevant and not relevant.

12 MS. MUETING: Your Honor, I would be happy to address  
13 that. I appreciate that question.

14 Also, it has been the practice of this case that the  
15 parties have not produced expert analysis that was not related  
16 to the expert report. For example, KPMG has explicitly  
17 withheld prior analysis conducted by its experts on the basis  
18 that they were a preliminary analysis, unrelated to the expert  
19 report, the very same types of evidence, the very same type of  
20 information that plaintiffs are not producing here. It's well  
21 beyond the scope of the expert report, outside the merits of  
22 the expert report, and it's well beyond the scope of the  
23 Court's order.

24 THE COURT: I guess I would just add that the drafters  
25 of the Federal Rules of Civil Procedure changed the rule in

1 order to protect basically experts' preliminary work and  
2 communications with experts, and so it makes sense to me that  
3 in general both sides have not been producing work that wasn't  
4 related to the final opinion. I know that we have had a  
5 journey together to get here, but will someone just remind me  
6 of the details of how we are in this particular position with  
7 respect to this expert?

8 I'll hear from Ms. Muetting first. Then I'll hear from  
9 Ms. Kenney.

10 MS. MUETING: First of all, your Honor, the parties  
11 exchanged information relating to the opinions offered in the  
12 expert report. KPMG then came back to the Court at our last  
13 hearing, months after the close of expert discovery, and  
14 requested information relating to certain specific analysis and  
15 asked whether Dr. Becker had ran the specific analysis; in  
16 particular, if he ran pay by title or promotions by year.  
17 Dr. Becker answered those questions and provided the only  
18 analysis that was even arguably responsive to those questions.

19 Again, that analysis was located in a larger  
20 programming file that did include preliminary analysis, as your  
21 Honor alluded to earlier, and analysis and programming that was  
22 done at the request of counsel and included attorney work  
23 product.

24 Plaintiffs produced only that information that was  
25 responsive to the Court's order, even though it was well beyond

1 the scope of the expert report, and this information that KPMG  
2 is now seeking is akin to producing an entire file cabinet or  
3 an entire notebook simply because it includes that analysis  
4 ordered by the Court.

5 THE COURT: Ms. Kenney.

6 MS. KENNEY: Your Honor, I feel a little bit like I'm  
7 playing hide and go seek here. We did consider for material  
8 that was related to the analysis that what we had moved to  
9 compel, when we found out that we both had reason to believe  
10 that Dr. Becker, when he said that he couldn't recall whether  
11 he had run these analyses, that's why we moved to compel them.  
12 They are clearly related to the analysis that is included in  
13 his final report.

14 Ms. Mueting is correct, we have no idea what was  
15 redacted. Unlike any redactions that KPMG made, plaintiffs can  
16 always tell what it was that was redacted. We have no idea  
17 what was redacted here. I can't tell you what's in there and  
18 why it is relevant because it's not in there for me to tell you  
19 why it is relevant or why it's related to the analysis, but  
20 it's in the middle of a program that plaintiffs have produced  
21 responsive to the Court's order.

22 MS. MUETING: Your Honor, if I may make a finer point  
23 on one of the points. KPMG is asserting that it must be  
24 related because it's within the same file cabinet, and KPMG is  
25 assuming that this is related to a cost center analysis.

1 Dr. Becker explained to KPMG during his deposition  
2 that he did not do this analysis by cost center. Plaintiff  
3 explained to KPMG that this is not an analysis by cost center.

4 Again, this is the preliminary analysis, some  
5 preliminary information that was created by Dr. Becker after  
6 request of counsel and is, therefore, is well outside the scope  
7 of what is required to be produced as part of Dr. Becker's  
8 report and well outside the scope of what was required to be  
9 produced by the Court's most recent order.

10 THE COURT: There are times in litigation -- for  
11 example, when a privilege log is generated -- that a party  
12 makes a representation that information should not be  
13 disclosed. Ordinarily the parties and the Court honor and  
14 respect that representation unless there is some reason to  
15 believe that it is questionable.

16 I guess in this case here, because of my unfamiliarity  
17 with programming, I am not in a position to say whether it's  
18 odd or not that what's been redacted is in the middle of a  
19 program that was deemed by plaintiffs to be relevant.

20 What I would like to do, and then I'll hear your  
21 comments on it, is what I would do in the context of a  
22 privilege log that had been challenged, and that is, I would  
23 ask for some ex parte explanation and/or examination. But  
24 since my examination would not be useful, I think explanation  
25 is more appropriate here. Based on that, I can try to make a

1 judgment about whether this all makes sense to me.

2 I don't want to suggest, Ms. Mueting, that I doubt  
3 your representation because I don't, and you've all, on both  
4 sides, acted honorably and been honest, as far as I can tell,  
5 with both the Court and with each other. I don't mean to  
6 suggest otherwise with my order. But I would be more  
7 comfortable, just given the context, if I could.

8 If you would like to put in your letter, Ms. Mueting,  
9 some explanation that you have, after consulting with your  
10 technical people, that has an explanation of what these kinds  
11 of files, I guess they are stata files, what these kind of  
12 files are and either how this is typical, that basically that  
13 it's more like a file cabinet and there is all kinds of  
14 information sort of intermingled and intermixed in it, I would  
15 welcome that.

16 Any thoughts from anyone?

17 MS. KENNEY: Your Honor, that is acceptable to KPMG.

18 THE COURT: Ms. Mueting, are you comfortable with  
19 that?

20 MS. MUETING: Yes, your Honor. I will e-mail our  
21 letter separately to chambers.

22 THE COURT: That's fine, yes.

23 MS. MUETING: We can do that within a week.

24 THE COURT: That's fine.

25 The one thing I want to just add here, I know that

1 there have been a couple of bumps in the road as we try to get  
2 to the full and final briefing of the class certification  
3 motion.

4 I just want to alert you to something schedule wise.  
5 As you may know, Mr. Paredes has been my law clerk, one of  
6 several in succession on this case, and he has been very  
7 involved in this case when his clerkship started in September.  
8 I am determined to try to get him to help me with a decision on  
9 this class certification motion rather than try to put a  
10 brand-new law clerk on that as one of their first assignments.  
11 I had extended slightly the schedule as a result of our last  
12 discussion. I just wanted to let you know that, barring  
13 hurricanes or bombs, it's just not going to be moved again.

14 Thank you. A week is fine.

15 I look forward to your letter, Ms. Muetting.

16 We are adjourned.

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